

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 20, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2012AP889**

**Cir. Ct. No. 2010FA353**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**DOROTHY CHARLOTTE WHEELER,**

**PETITIONER-RESPONDENT,**

**V.**

**JANSSON STEPHAN WHEELER,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
DAVID T. FLANAGAN III, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Jansson Wheeler appeals a judgment of divorce, arguing that the circuit court erroneously exercised its discretion by ordering an unequal division of the marital estate. In particular, he argues that the circuit court

should have equally divided the pensions belonging to him and his former wife, Dorothy Wheeler. We affirm.

## **BACKGROUND**

¶2 Jansson and Dorothy were married in 1956 and Dorothy filed an action for divorce in February 2010. Jansson and Dorothy were ultimately unable to reach an agreement on the division of their property, in particular, the division of their individual retirement accounts, which are in their disbursement phase. Jansson, who retired from his work as an attorney in 1985 after losing his eyesight, had a pension that was valued at \$74,399.78. Dorothy, who retired from teaching in 1998, had a retirement account that was valued at \$356,097.56. Because they were unable to reach an agreement, the issue of the division of their retirement accounts was tried to the circuit court.

¶3 At trial, evidence was presented that in July 2010, approximately five months after Dorothy filed the present action for divorce, Jansson was charged with attempted first-degree intentional homicide and the possession of an explosive device for an unlawful purpose. The charges against Jansson apparently stemmed from an incident in which Jansson sought to purchase an explosive device, which he intended to have sent to the residence of Dorothy's friend in Montana, whom she was visiting around the time Jansson intended the explosive device to be sent. Jansson was convicted of attempted first-degree intentional homicide, and was sentenced to two years' imprisonment. At the time of trial, Jansson remained incarcerated for his conviction.

¶4 Following the trial, the circuit court awarded Jansson and Dorothy their separate retirement accounts. In reaching that decision, the circuit court considered: the age and health of the parties; their contributions to the marriage;

their earning capacities; and the tax consequences. The court also took into consideration the parties' separate financial needs. The court found that Jansson had, prior to his incarceration, been able to "meet his needs quite adequately under [his] pension and Social Security benefits," and it found that the record did not indicate that Jansson would have any greater needs upon his release. The court also found that Dorothy was in need of the entirety of the retirement benefits she was receiving from her retirement account "in order to continue her standard of living that she enjo[yed] before the divorce." Finally, the court considered Jansson's criminal conviction. The court rejected a claim by Jansson that he had not intended to harm Dorothy as not credible and "border[ing] on absurd." The court found that Jansson's "misconduct was substantial" and stated that "it [] weigh[ed] very heavily" on its decision to unequally divide the parties' retirement accounts. Jansson appeals.

## DISCUSSION

¶5 Jansson contends that the circuit court erred in awarding Dorothy the entirety of her retirement account, which resulted in an unequal division of property.

¶6 The division of property upon divorce rests within the discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will uphold the circuit court's decision if it "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* (quoted source omitted).

¶7 In dividing property, the circuit court begins with the presumption that the divorcing parties' marital estate is to be equally divided. WIS. STAT.

§ 767.61(3) (2011-12).<sup>1</sup> However, the court may deviate from equal distribution after considering the factors identified in § 767.61(3)(a)-(m).<sup>2</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> WISCONSIN STAT. § 767.61(3) provides:

The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (e) The age and physical and emotional health of the parties.
- (f) The contribution by one party to the education, training, or increased earning power of the other.
- (g) The earning capacity of each party....
- (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
- (i) The amount and duration of an order under s. 767.26 granting maintenance....
- (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
- (k) The tax consequences to each party.
- (l) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution....

(continued)

¶8 Jansson argues that the circuit court’s division of the parties’ retirement accounts was an erroneous exercise of the circuit court’s discretion because: (1) the court considered factors not relevant to whether the presumption should be deviated from, in particular his conviction for attempted first-degree intentional murder; and (2) the court failed to adequately explain the basis for the deviation. We address these arguments in turn below.

*A. The Court’s Consideration of Factors Claimed to be Improper*

¶9 WISCONSIN STAT. § 767.61(3) provides that although the court may deviate from the presumption of equal division of property, the deviation must be “without regard to marital misconduct.” Jansson argues that the circuit court misapplied the law when it considered his conviction for attempted first-degree intentional homicide because that conduct constituted “marital misconduct,” which is prohibited from consideration under § 767.61(3).

¶10 In *Brabec v. Brabec*, 181 Wis. 2d 270, 274-76, 510 N.W.2d 762 (Ct. App. 1993), this court addressed whether a circuit court misapplied the law in denying maintenance to a wife after taking into consideration the wife’s conviction for soliciting the murder of her former husband. The supreme court in *Dixon v. Dixon*, 107 Wis. 2d 492, 505, 319 N.W.2d 846 (1982), had held that consideration of marital misconduct in determining maintenance is prohibited.<sup>3</sup>

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(m) Such other factors as the court may in each individual case determine to be relevant.

<sup>3</sup> The supreme court concluded in *Dixon v. Dixon*, 107 Wis. 2d 492, 505, 319 N.W.2d 846 (1982), that even though WIS. STAT. § 767.26 did not explicitly prohibit consideration of marital misconduct, “the legislature did not intend to allow the circuit court to consider marital misconduct a relevant factor in granting maintenance payments.” *Cf.* WIS. STAT. § 767.61(3) (explicitly prohibiting consideration of marital misconduct).

We recognized in *Brabec* that even though the statute<sup>4</sup> governing what factors are to be considered in awarding maintenance does not explicitly provide that marital misconduct cannot be considered, the effect of the supreme court’s holding in *Dixon* “was to add to the statute [the prohibition that] ... marital misconduct is not to be considered in determining maintenance.” *Brabec*, 181 Wis. 2d at 278-79.

¶11 Notwithstanding *Dixon*, we held in *Brabec* that the circuit court in that case did not misapply the law by taking into consideration the wife’s murder solicitation in denying her maintenance. We did so for the following reasons. First, we stated that “to construe [WIS. STAT. §] 767.26 ... as denying the [circuit] court the discretion to consider the fact that [the wife] attempted to hire someone to kill her former husband would achieve an unreasonable result,” which is contrary to our rules of statutory construction. *Id.* at 279. See *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997) (it is a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided). Second, we stated that *Brabec*, which concerned an attempt to have a spouse killed, was factually distinguishable from *Dixon*, which was issued in the context of adultery, and therefore did “not fit into the reasoning used in *Dixon*.” *Brabec*, 181 Wis. 2d at 279-80. Third, we stated that the wife’s solicitation to have her former spouse killed “was not related to the marital relationship” and “had nothing to do with the break-up of the marriage,” noting: “[o]ne might assume that conduct as severe as trying to hire someone to kill one’s spouse is a last resort, and not the reason underlying the deterioration of

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<sup>4</sup> At the time, the statute setting forth the factors to be considered in awarding maintenance was WIS. STAT. § 767.26. Section 767.26 was subsequently renumbered as WIS. STAT. § 767.56. 2005 Wis. Act 443, §110.

the marriage.” *Id.* at 280. Finally, we stated that the circuit court was not punishing the wife for her acts by considering her solicitation for murder. Instead, “fairness to [the spouse was] being considered.” *Id.* at 282.

¶12 In the present case, we need not determine, as we did in *Brabec*, whether consideration of *all* instances of marital misconduct is prohibited when determining the division of property under WIS. STAT. § 767.61(3), because we conclude that the facts surrounding Jansson’s criminal conviction did not constitute “marital misconduct,” and were therefore not subject to prohibition from consideration by § 767.61(3). Jansson’s attempt to purchase an explosive device to be sent to Dorothy’s friend’s house occurred in July 2010, approximately five months after Dorothy commenced her action for divorce. Jansson’s criminal activity clearly did not have anything to do with the break-up of the parties’ marriage and was therefore not “marital misconduct” prohibited from consideration. See *Brabec*, 181 Wis. 2d at 280. Accordingly, we conclude that the circuit court’s consideration of Jansson’s criminal conduct was not contrary to § 767.61(3).

¶13 Jansson also argues that the circuit court improperly considered the financial resources Dorothy would need in order to continue living at the standard of living she had prior to the parties’ divorce. We read his brief further as arguing that even if such a consideration was proper, the evidence does not support the court’s finding that Dorothy needs the entirety of her retirement to meet her needs at that level. We disagree. WISCONSIN STAT. § 767.61(3)(m) authorizes the circuit court to consider other factors that the court determines to be relevant. Jansson has not argued that consideration of Dorothy’s financial needs is irrelevant. Nor has Jansson shown that the court’s finding that Dorothy needs the entirety of her retirement funds to meet her financial needs was clearly erroneous.

*See* WIS. STAT. § 805.17(2) (factual findings will be affirmed unless clearly erroneous). Accordingly, we reject this argument.

*B. Explanation of Deviation and Consideration of the Statutory Factors*

¶14 Jansson contends that the circuit court’s division of the parties’ retirement accounts was an erroneous exercise of discretion because the court failed to take into consideration all of the applicable factors enumerated in WIS. STAT. § 767.61(3), as required under *LeMere*, 262 Wis. 2d 426, ¶¶22-26. Specifically, he contends that the court failed to consider: (1) property that had been inherited by Dorothy, and therefore not subject to division by the court; and (2) the cost of care that he will require due to his blindness and deteriorating health.

¶15 Under WIS. STAT. § 767.61(3), a circuit court must consider thirteen enumerated factors before deviating from an equal division of marital property. Those factors include, in part, “[w]hether one of the parties has substantial assets not subject to division by the court” and “[t]he age and physical and emotional health of the parties.” Sections 767.61(3)(c) and (e). The supreme court stated in *LeMere* that the record “must at least reflect the court’s consideration of all applicable statutory factors,” and that “[t]he failure to do so is an erroneous exercise of discretion.” *LeMere*, 262 Wis. 2d 426, ¶25.

¶16 At trial, the court considered: the parties’ age and health, in particular Jansson’s blindness and need to reside in an assisted living facility upon his release from prison; their contribution to one another’s education and earning power; their earning power; the marital home, which had been sold prior to trial and the assets from the sale divided between the parties; that Dorothy had waived maintenance and that the issue of whether Jansson would be entitled to



maintenance would be held open; that Jansson was able to meet his financial needs adequately on his pension and social security benefits alone; that Dorothy needed the income generated from her larger retirement account in order to meet her financial needs; that there were no known tax consequences; that the parties did not have a written agreement pertaining to property division; and Jansson's criminal conviction. *See* WIS. STAT. § 767.61(3)(e)-(m). In its "Findings of Fact, Conclusions of Law," the court identified the longevity of the parties' marriage and took notice of all assets that Dorothy had identified in her financial disclosure form, which included the non-divisible property inherited by Dorothy. *See* § 767.61(3)(a), (c). We conclude that the court considered the relevant statutory factors, which supported the court's decision to award Dorothy an unequal division of the parties' retirement accounts.

### CONCLUSION

¶17 For the reasons discussed above, we affirm.

*By the Court.*—Judgment affirmed.

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